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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

May 21, 1996

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

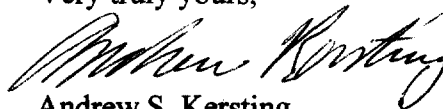
Re: MM Docket No. 92-81; RM-7875
Farmington and Gallup, New Mexico

Dear Mr. Caton:

Enclosed for filing on behalf of KOB-TV, Inc., are an original and four copies of a Reply to Opposition to Petition for Reconsideration, filed in the above-referenced proceeding.

Should any question arise concerning this matter, please communicate directly with this office.

Very truly yours,



Andrew S. Kersting
Counsel for KOB-TV, Inc.

Enclosure

cc (w/ encl.): John A. Karousos (via hand delivery)
Erwin G. Krasnow, Esquire

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BEFORE THE

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MAY 21 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Section 73.606(b),) MM Docket No. 92-81
Table of Allotments,) RM-7875
Television Broadcast Stations,)
(Farmington and Gallup, New Mexico))

To: Chief, Allocations Branch
Mass Media Bureau

REPLY TO
OPPOSITION TO PETITION FOR RECONSIDERATION

KOB-TV, Inc. ("KOB"), licensee of Stations KOB-TV, Albuquerque, New Mexico, and KOB(TV), Farmington, New Mexico, by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby replies to the Opposition to Petition for Reconsideration ("Opposition"), filed April 11, 1996, in the above-captioned proceeding by Pulitzer Broadcasting Company ("Pulitzer").¹ In support of this reply, the following is stated:²

¹ In the interest of expediting this protracted rulemaking proceeding, KOB is filing its reply early, long before the procedural deadline set forth in Section 1.429(g) of the rules. Indeed, to the best of counsel's knowledge, as of this date, public notice of the filing of KOB's March 29, 1996, Petition for Reconsideration ("Petition") has not been published in the Federal Register. Thus, the time period for filing an opposition and reply thereto has not yet started to run. See 47 CFR §§1.429(e), (f), and (g).

² KOB reiterates that in the event the Channel 3 facility at Gallup becomes available, it will file an application for that facility, and, if granted, promptly build and operate a satellite television station on Channel 3 in Gallup.

I.
**KOB Does Not Challenge the Mass Media Bureau's Grant of
Pulitzer's Extension Applications *Per Se*, But Only to the Extent
the Bureau Relies Upon the Grant of Those Applications as a
Basis For Finding That KOAV-TV Is Not An "Existing Service"**

Pulitzer claims KOB's allegations that Pulitzer's seven extension applications violated Section 73.3534(b) of the Commission's rules constitutes an "untimely collateral attack" on the Bureau's findings with respect to each of those applications, and, for that reason, must be rejected. Opposition, p. 4. Pulitzer further argues that even assuming, *arguendo*, KOB's Petition properly raised the issue of whether Pulitzer's extension applications complied with §73.3534(b), KOB's claim should be rejected on its merits because each of Pulitzer's extension requests complied with that provision. *Id.*

For the reasons stated at pages 6-9 of its Petition, KOB strongly contends that not one of Pulitzer's seven extension applications complied with Section 73.3534(b) of the rules. Nevertheless, KOB does not challenge the grant of Pulitzer's extension applications *per se*. Instead, KOB challenges the grant of the respective extension applications only to the extent the Mass Media Bureau ("Bureau") relies upon the grant of those applications as a basis for applying the definition of "existing service" set forth in Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990) ("Modification of License MO&O"). In other words, KOB challenges the Bureau's grant of Pulitzer's seven extension applications only to the extent the extension requests serve as a basis for finding that Station KOAV-TV ("KOAV")³ is not an "existing service", and, hence, that the proposed reallocation

³ KOB recognizes that the current call letters of the Channel 3 facility in Gallup are KOFT-TV. However, in order to be consistent with the Bureau's Report and Order, 11 FCC Rcd 2357 (Mass Med. Bur. 1996) ("Report and Order"), KOB will continue to refer to the station by its former call letters, KOAV-TV ("KOAV").

of Channel 3 from Gallup to Farmington, New Mexico, would not create a substantial "white area" of over 62,000 persons.

With respect to the merits of the Bureau's grant of Pulitzer's extension applications, Pulitzer claims the Commission has rejected KOB's argument that a permittee is required to construct its station during the pendency of a rulemaking proceeding concerning the same station. Opposition, p. 5, citing Contemporary Media, Inc., 10 FCC Rcd 13685 (1995). Pulitzer attempts to distinguish the Commission precedent cited by KOB by claiming that none of those cases involved the pendency of a rulemaking proceeding concerning the permittee's station itself. Opposition, pp. 5-6. Pulitzer further claims that in the cases cited by KOB, the permittee failed to construct either because (1) the pending FCC proceeding was expected to have some collateral effect on the station's market, or (2) "*economic conditions in the subject station's market allegedly impeded the permittee's ability to construct.*" *Id.* at 6 (emphasis added).

Pulitzer's attempt to distinguish the Commission precedent cited by KOB is wholly unavailing. In the two cases cited by KOB which involved a pending rulemaking proceeding, Community Service Telecasters, Inc., 6 FCC Rcd 6026 (1991), and New Dawn Broadcasting, 2 FCC Rcd 4383 (Mass Med. Bur. 1987), the Commission did not even suggest that the reason it denied the permittees' extension applications was because the subject rulemaking proceeding in each of those cases concerned some other station, and did not relate directly to the respective permittee's station. Moreover, in the only case cited by Pulitzer, Contemporary Media, the Commission did not attempt to distinguish the case from those cited by KOB, nor did the Commission make any reference to the fact the pending rulemaking proceeding concerned the permittee's station, rather than another station in the market. Instead, the Commission merely stated that it does not require a permittee to build

"lower class facilities" when the permittee has filed a timely proposal to *upgrade* to a higher class of station. 10 FCC Rcd at 13689. Indeed, the facts in Contemporary Media are significantly different from those concerning Pulitzer's proposed reallocation because Pulitzer's proposal does not involve an upgrade or "higher class of station," but, rather, a change in community of license.

Furthermore, as demonstrated in KOB's Petition, the underlying reason for Pulitzer's multiple extension requests was identical to that of the permittees in Community Service Telecasters, New Dawn Broadcasting, Cidra Broadcasters, Inc., 2 FCC Rcd 230 (Mass Med. Bur. 1987), and both decisions in East Texas Television Network, Inc., 2 FCC Rcd 2931 (Mass Med. Bur. 1987); 2 FCC Rcd 2933 (Mass Med. Bur. 1987) -- i.e., the alleged economic inability of the community of license to support the permittee's television station. In a futile attempt to distinguish its dilatory conduct from that exhibited in each of the cases cited in KOB's Petition, Pulitzer claims that its concerns regarding the economic viability of operating KOAV in Gallup only "contributed" to its failure to construct, and that the real reason was the pending rulemaking proceeding itself:

While concern about the ability of the Gallup community economically to sustain operation of a television station contributed to Pulitzer's decision to seek the rulemaking, Pulitzer's failure to construct the Station is attributable *wholly to the pendency of that proceeding, not to any other motive.*

Opposition, p. 6 (emphasis added). Pulitzer further claims that its "primary motivation and justification" for filing its rulemaking petition was that the reallocation of Channel 3 to Farmington would result in a preferential arrangement of allocations because it would enable KOAV to provide a first Grade B service to 3,366 persons, and a second such service to 67,444 persons. *Id.* at n. 10.⁴

⁴ At note 10, Pulitzer indicates that its proposal would provide service to "142,098 persons", including a *first* Grade B reception service to "90,462 persons", citing Report and Order, at ¶2. Pulitzer's reference to the population data contained in its initial engineering report
(continued...)

Pulitzer's argument that its failure to construct is attributable solely to the pendency of the rulemaking proceeding itself is frivolous. Indeed, it merely begs the question of why Pulitzer filed its rulemaking petition. The facts in this proceeding establish that the only reason Pulitzer sought the reallocation of Channel 3 is because of its concerns regarding the economic viability of operating KOAV in Gallup. The only other basis Pulitzer offers for filing its rulemaking petition is that the proposed reallocation would result in a "preferential arrangement of allotments" because it would enable KOAV to provide a first Grade B reception service to 3,366 persons and a second such service to 67,666 persons. Pulitzer's argument is absurd. If Channel 3 were retained at Gallup, KOAV would provide a first Grade B reception service to over 62,000 people. Furthermore, Pulitzer has expressly stated that it will not construct the Channel 3 facility unless it is reallocated to Farmington. See Report and Order, ¶21. The Bureau should reject Pulitzer's frivolous claim and find that the permittee's concern regarding the economic viability of operating KOAV in Gallup was the sole basis for Pulitzer's rulemaking petition. Therefore, because the failure to construct due to economic concerns is a business decision, and does not constitute a circumstance "clearly beyond the permittee's control," the construction permit for KOAV should be cancelled and the call sign deleted. Community Service Telecasters, 6 FCC Rcd 6026; New Dawn Broadcasting, 2 FCC Rcd 4383; Cidra

⁴(...continued)

is misleading because these data (first Grade B service to 11,232 persons and *second* such service to 90,462 persons) were revised substantially in its subsequent engineering report which demonstrated that its proposed reallocation would provide a first Grade B service only to 3,366 persons and a second such service to 67,444 persons. See Report and Order, ¶5. In any event, these figures are substantially less than what KOAV would provide if it were constructed in Gallup, *i.e.*, a first Grade B reception service to over 62,000 people.

Pulitzer's statement that it expected to provide a *first* Grade B reception service to over 90,000 people obviously was a misstatement. Indeed, there would have been little dispute that the proposed reallocation would result in a preferential arrangement of allotments if it would have provided a first Grade B reception service to 90,000.

Broadcasters, 2 FCC Rcd 230. Moreover, due to Pulitzer's dilatory conduct in failing to construct the Gallup station, KOAV should be regarded as an "existing service" and the proposed reallocation should be denied for the reasons stated in paragraph 22 of the Report and Order.

II.

Pulitzer Has Abused the Commission's Processes and Should Not Be Permitted to Benefit From Its Wrongful Conduct By Having Channel 3 Reallocated to Farmington

In response to KOB's showing that Pulitzer has abused the Commission's processes by filing an application without an apparent intention of constructing Channel 3 at Gallup, Pulitzer claims that KOB's argument is "procedurally barred." Specifically, Pulitzer claims that "KOB possessed all of the material facts supporting its argument . . . when it filed its comments and reply comments in this proceeding." Opposition, p. 8. Pulitzer also claims that the record in this proceeding indicates that it had a *bona fide* intent to construct the Gallup station at the time it filed its original application. In support of its claim, Pulitzer notes that it originally applied for Channel 3 at Gallup with the intention of using KOAV as a satellite of Station KOAT-TV, Albuquerque, New Mexico. Pulitzer claims that only later did it determine that the Gallup market cannot economically support a television station.

Id.

Pulitzer's arguments are without merit. First, at the time KOB filed its reply comments in this proceeding on June 23, 1992, Pulitzer had filed only one extension application (File No. BMPCT-920129KJ). Pulitzer did not file its second extension request until July 22, 1992 (File No. BMPCT-920722KK). Moreover, it was not until September 1, 1995, over three years after the filing of KOB's reply comments that Pulitzer provided the most demonstrative evidence of its true intent in this proceeding. Despite having filed six previous applications to extend its construction permit for

KOAV, on September 1, 1995, Pulitzer filed an application seeking the reinstatement of its KOAV construction permit (and seventh extension request), and represented to the Commission that it was "under the mistaken impression that the permit was automatically extended because of the pendency of the . . . Petition for Rule Making." See Petition, Exhibit G, p. 3. Pulitzer's explanation for the late filing of its September 1, 1995, extension application contrasted sharply with its previous explanation (contained in its April 28, 1994, application to replace its expired construction permit) in which it merely stated it had "missed the expiration date." See Petition, Exhibit, E, p. 4. Indeed, Pulitzer's six previous extension applications clearly establish that Pulitzer was fully cognizant of the fact the mere pendency of the instant rulemaking proceeding did not automatically extend the time for constructing KOAV. Therefore, KOB's argument that Pulitzer has abused the Commission's processes by filing an application, in which Pulitzer's own statements demonstrate that it has been less than candid with the FCC, is not procedurally barred.

Furthermore, the record in this proceeding establishes that Pulitzer never intended to construct Channel 3 at Gallup. Thus, Pulitzer abused the FCC's processes by filing its initial application. As demonstrated above, Pulitzer filed its petition seeking the reallocation of Channel 3 from Gallup to Farmington based solely on the economic conditions of the Gallup market. However, the FCC expects applicants to weigh the economic conditions in their prospective market *before* they apply for the channel. Cidra Broadcasters, Inc., 2 FCC Rcd at 231-32. In this case, Pulitzer filed its petition for rulemaking to reallocate the Channel 3 facility less than two months after its application was granted, and only six months after filing its application. See Petition, p. 3. Pulitzer has made no attempt to show there was any change in the economic conditions in the Gallup market between the filing of its application and its rulemaking petition. Instead, Pulitzer has admitted that Gallup has

experienced almost stagnant growth over the last 20 years. Report and Order, ¶9. Pulitzer also has been aware that the three VHF channels allotted to Gallup have not been applied for since their allotment almost 40 years ago, and Pulitzer faced no competing applicants for the Gallup facility. Id.

Under Cidra, Pulitzer either knew or should have known of the economic conditions in the Gallup market before it applied for the Channel 3 facility. Indeed, Pulitzer is an experienced broadcaster with stations in a variety of markets across the country.⁵ Thus, considering the short, six-month time period between the filing of Pulitzer's application and its rulemaking petition, it is highly likely that Pulitzer was well aware of the economic conditions of the Gallup market at the time it filed its application. Moreover, Pulitzer never proposed to operate a full-service, stand-alone facility in Gallup, but, rather, always intended to have the Gallup station operate as a satellite of Station KOAT-TV, Albuquerque. See Opposition, p. 7. The fact that Pulitzer never intended to operate a more expensive, stand-alone facility further suggests that Pulitzer was aware of the economic condition of the Gallup market at the time it filed its application. When these facts are considered in conjunction with Pulitzer's representation to the Commission on September 1, 1995, that, despite having filed six previous extension applications over nearly four years, Pulitzer was "*under the mistaken impression that the permit was automatically extended because of the pendency of the . . . Petition for Rule Making*" (see Petition, Exhibit, G, p. 3) (emphasis added), the evidence establishes that Pulitzer has abused the Commission's processes because it did not intend to construct Channel 3 in Gallup.

⁵ Pulitzer is the licensee of the following two radio and nine television stations: KTAR(AM) and KKLT(FM), Phoenix, AZ; WESH(TV), Daytona Beach, FL; KCCI(TV), Des Moines, IA; WLKY(TV), Louisville, KY; WDSU(TV), New Orleans, LA; KETV(TV), Omaha, NE; KOAT-TV, Albuquerque, NM; WXII(TV), Winston-Salem, NC; WGAL(TV), Lancaster, PA; and WYFF(TV), Greenville, SC. Broadcasting & Cable Yearbook, p. A-118 (1996).

Pulitzer should not be entitled to benefit from its wrongful conduct by claiming that, because it failed to construct KOAV, the reallocation of Channel 3 from Gallup to Farmington will not result in the removal of an existing service. The definition of "existing service" set forth in Modification of License MO&O (equating existing service with an operating station) reflects the Commission's general policy in allotment proceedings, and necessarily assumes that the permittee filed its application in good faith. The Bureau erred in applying that policy in this proceeding because, in doing so, it ignored the reason why KOAV has not been built, and effectively rewarded Pulitzer for its wrongful conduct. Indeed, the purpose of Modification of License MO&O was to facilitate changes in community of license of *existing stations*, not encourage parties to file applications for stations which they have no intention of building in the hopes of later moving the station to a more desirable locale. If the Bureau does not reconsider its Report and Order and deny Pulitzer's proposed reallocation, the Bureau's decision will set an unsatisfactory precedent. Thus, in accordance with paragraph 22 of the Report and Order, the Bureau, on reconsideration, should treat KOAV as an "existing service" for purposes of evaluating Pulitzer's rulemaking petition, and conclude that the reallocation of Channel 3 would involve the removal of Gallup's "sole local operating station," thereby creating a substantial "white area" of over 62,000 persons. Therefore, Pulitzer's proposal should be denied because the proposed reallocation of Channel 3 from Gallup to Farmington will not result in a preferential arrangement of allotments.

WHEREFORE, in light of the foregoing, KOB-TV, Inc., respectfully requests the Commission to RECONSIDER its Report and Order, released February 23, 1996, and DENY the request of Pulitzer Broadcasting Company to reallocate Channel 3 from Gallup to Farmington, New Mexico.

Respectfully submitted,

KOB-TV, INC.

By: 

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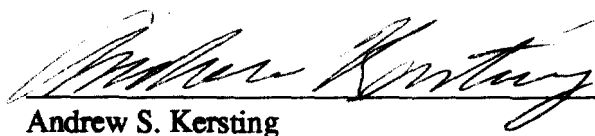
May 21, 1996

CERTIFICATE OF SERVICE

I, Andrew S. Kersting, hereby certify that on this 21st day of May, 1996, copies of the foregoing "Reply to Opposition to Petition for Reconsideration" were sent by first-class mail, postage pre-paid, to the following:

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